

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2024

Public Authority: University Hospitals Sussex NHS Foundation Trust

Address: Lyndhurst Road
Worthing
West Sussex BN11 2DN

Decision (including any steps ordered)

1. In a three part request, the complainant has requested information associated with a death that occurred from University Hospitals Sussex NHS Foundation Trust ('the Trust'). The complainant was provided with relevant information outside of FOIA and the Trust's final position had been to rely on sections 40(5A) and 40(5B) of FOIA (personal data) to refuse to confirm or deny it holds the requested information. The complainant was concerned that the Trust holds further information within scope of Q1 of their request that it hasn't provided and disputed its reliance on sections 40(5A) and (5B).
2. During the Commissioner's investigation, the Trust reconsidered its position. It has now confirmed that, other than the relevant information that had already been provided to the complainant, it holds no other information within scope of Q1 of the request. It has also confirmed that it doesn't hold the specific information requested in Q2 and Q3 and that to the degree that relevant information it does hold addresses these questions, that information is exempt from disclosure under section 40(2) of FOIA.
3. The Commissioner's decision is as follows:
 - On the balance of probabilities, the Trust holds no further information within scope of Q1 of the request.

- The Trust doesn't hold the specific information requested in Q2 and Q3 of the request and the information that it holds that's broadly relevant is exempt from disclosure under section 40(2) of FOIA. This is because that information is other people's personal data and disclosing it wouldn't be lawful.
4. It's not necessary for the Trust to take any corrective steps.

Request and response

5. On 11 January 2024, the complainant submitted a three part request to the Trust for information about a death that had occurred at the Trust. To protect the complainant's personal data, the Commissioner hasn't reproduced the request here, but it's a request for (Q1) information relating to an inquest, (Q2) the names of particular members of Trust staff who the complainant considers didn't respond to telephone calls and (Q3) the reasons why those staff didn't respond to the calls (Q3).
6. The Trust responded to the request on 6 February 2024. It referred to the FOIA exemptions under sections 32 (court records), 40 and 41 (information provided in confidence). The Trust has subsequently confirmed to the Commissioner that it wasn't withholding any information under section 32 or section 41 but had simply referred to those two exemptions for the complainant's information.
7. With regard to Q1 of the request, the Trust advised the complainant that it understood that they had already received this information from HM Coroner and asked them to clarify if there was other information, relevant to this question, that they were seeking. It said it would be happy to provide additional information but that it would be likely to do so outside of FOIA.
8. The Trust advised that the information requested in Q2 and Q3 was exempt from disclosure under section 40(2) of FOIA.
9. The Trust's Chief Executive wrote to the complainant on 15 February 2024 – the Commissioner understands this to have been outside of FOIA. He advised that the complainant had received the final investigation report that the Trust had submitted to the Coroner, and it sent the complainant supporting emails and documents to evidence this.
10. The complainant wrote to the Trust on 7 March 2024, confirming the information they'd requested that they considered remained outstanding.
11. The Trust wrote to the complainant again on 8 April 2024. It amended its position and advised that it was now relying on section 40(5A) and

40(5B) of FOIA to refuse the request. These exemptions remove the duty on a public authority under section 1(1) of FOIA to confirm or deny it holds information that an applicant has requested.

12. The complainant requested an internal review on 23 April 2024 and the Trust provided one on 16 May 2024. It maintained its position that sections 40(5A) and 40(5B) apply to the request.

Scope of investigation

13. The complainant had submitted a complaint to the Commissioner on 14 May 2024. They disputed that they'd received all the information they'd requested in Q1 of their request. They said that this was because the Trust hadn't provided them with the "updated" documentation it said it had provided to HM Coroner in the course of an inquest hearing. The complainant also disputed the Trust's reliance on sections 40(5A) and 40(5B) to neither confirm nor deny it holds relevant information.
14. In its initial submission to the Commissioner, the Trust confirmed that it had applied sections 40(5A) and 40(5B) of FOIA to the three parts of the request. However, during the Commissioner's investigation the Trust reconsidered its response.
15. In a telephone conversation with the Commissioner on 18 September 2024, the Trust confirmed it was withdrawing its reliance on sections 40(5A) and (5B). The Trust confirmed that the complainant had been provided with all the information it holds that falls within scope of Q1 of the request and holds no other information that hasn't been provided to them.
16. The Trust also confirmed that it doesn't hold the specific information the complainant has requested in Q2 and Q3 of the request. It says that the only information the Trust holds that's broadly in scope of these parts is a staff rota for the dates in question, but it considers that this is exempt under section 40(2) of FOIA.
17. The complainant has wider concerns about the Trust and the treatment the deceased individual received. The Commissioner is sympathetic to the complainant's distress and appreciates their strong personal interest in this matter. However, his role must be solely to consider whether the Trust complied with FOIA in its handling of the complainant's request for information.
18. The focus of this investigation will therefore be to consider whether the Trust holds further information within scope of Q1 of the request. The Commissioner will also consider whether the Trust holds the specific

information requested in Q2 and Q3 of the request and its application of section 40(2) to a staff rota.

Reasons for decision

Section 1 – right of access to information held by a public authority

19. Section 1(1) of FOIA places a duty on a public authority such as the Trust to confirm whether it holds information an applicant has requested and to disclose the information if it's held and isn't exempt from disclosure.
20. In Q1 of the request the complainant has requested information relating to evidence given by a Trust employee at an inquest. The requested information includes emails, letters, notes, reports, records and presentations. The complainant has acknowledged the relevant information that has been provided to them, but considers the Trust holds further information, specifically "updated" information.
21. In their telephone conversation, the Commissioner discussed this with the Trust. The Trust explained that it had provided HM Coroner with its final investigation report into the death that had occurred. At the inquest, a member of Trust staff had made a statement to the effect that they didn't now agree with one sentence in the investigation report. The Trust considers that the complainant believes that the Trust holds an 'updated' or 'revised' investigation report that was produced as a result of the statement the staff member had made at the inquest.
22. The Trust confirmed to the Commissioner that it has made no changes to its investigation report. It says there was no need or requirement for it to change the report. As such, the Trust says, it holds no other versions of this report and no other information within scope of Q1 that hasn't already been provided to the complainant (which includes a copy of the investigation report). The Trust confirmed that it has checked with the relevant Divisional Team and Central Patient Safety Team. Both have confirmed that nothing else was written and there are no emails or other communications about updating the investigation report, because the report wasn't updated.
23. In the Commissioner's view, the Trust has sufficiently considered whether it holds any additional information including having discussions with relevant teams. The Commissioner can see no reason why an investigation report that had already been presented to HM Coroner would have been changed, irrespective of statements any witnesses had made at the associated inquest. On the balance of probabilities, the Commissioner finds that the Trust holds no further information within

scope of Q1 of the request that hasn't already been provided to the complainant.

24. Q2 of the request is for the names of the members of Trust staff who the complainant considers were involved in the circumstances of the death that occurred, by not responding to telephone calls. Q3 of the request is for the reasons why those staff members didn't respond to the calls made to them.
25. In the telephone conversation with the Commissioner, the Trust explained that, on the days in question, calls had been made to a general telephone number associated with staff in a certain role. However, the calls hadn't been made to any specific staff member – because the telephone number isn't associated with any specific staff member; it's a general number. The telephone calls weren't picked up, but no messages were left for any of the staff in that role and no members of those staff were asked to call back or respond.
26. As such, the Trust doesn't hold the names the complainant has requested and doesn't hold information on the reasons why any specific member of staff didn't respond to the telephone calls. As above calls were made to a general number, not to any specific staff member, and no messages or requests were left for any specific staff member, asking them to respond.
27. The Commissioner accepts the Trust's explanation. He finds that, because of the circumstances it has described, the Trust doesn't hold the names the complainant has requested in Q2 and therefore also doesn't hold the reasoning the complainant has requested in Q3.
28. The Trust says it holds a staff rota for the days in question, but this rota wouldn't address the complainant's questions – it's simply a list of names of those who were in a certain role on those days; it wouldn't address the specific questions asked in Q2 and Q3 of the request for the reasons explained above.
29. To the degree that this rota falls within scope of Q2 and Q3 of the complainant's request, the Trust has confirmed that it's withholding the rota under section 40(2) of FOIA. The Commissioner has gone on to consider whether the Trust is entitled to rely on that exemption.

Section 40 – personal data

30. Under section 40(2) of FOIA information is exempt from disclosure if it's the personal data of an individual other than the applicant and disclosure would contravene any of the principles relating to the

processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).

31. The most relevant principle is Article 5(1)(a). This states that:
"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
32. The Commissioner has first considered whether the staff rota the Trust is withholding under section 40(2) can be categorised as other individuals' personal data.
33. Personal data is defined as information that relates to a living individual and from which the individual can be identified.
34. The Commissioner is satisfied that the names on the staff rota can be categorised as personal data – this information relates to the staff concerned and they can be identified from it.
35. The staff rota in question therefore meets the above definition and is the personal data of other individuals, the staff members, who are the 'data subjects.'
36. The Commissioner has gone on to consider whether disclosing the rota would breach Article 5(1)(a) which, as above, states that personal data must be processed lawfully.
37. Personal data is processed when it's disclosed in response to a FOIA request. In order to be lawful under Article 5(1)(a), the lawful basis under Article 6(1)(f) of the UK GDPR must apply to the processing. It must also be generally lawful.
38. Article 6(1)(f) states:
"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."
39. In order to determine whether disclosing the personal data would be lawful the Commissioner has considered three 'tests': the legitimate interest test, the necessity test, and the balancing test.
40. The Commissioner appreciates that the complainant has a strong personal interest in the circumstances of the death that occurred and in those that they consider may have been involved in some way. That's an entirely legitimate interest for the complainant to have. There's also

a wider public interest in the Trust demonstrating that it's open and transparent, as appropriate.

41. The Commissioner has next considered whether disclosing the information would be necessary to meet the identified legitimate interests.
42. In this case the Commissioner considers there's an argument that disclosing the staff rota in question isn't necessary to meet the complainant's interests. This is because the complainant is seeking the names of staff in a particular role on particular days who they consider hadn't responded to phone calls, and the reasons why they hadn't responded.
43. The Commissioner has concluded above that the Trust doesn't hold that specific information and he has explained why it doesn't. Disclosing the staff rota therefore wouldn't answer the specific questions that the complainant has. However, in the interests of completeness, the Commissioner will accept that disclosing the staff rota would be necessary to fully address the complainant's broader interests. He's therefore gone on to carry out the final, balancing test.
44. In this test the Commissioner has balanced the complainant's legitimate interests against the data subjects' rights and freedoms.
45. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subjects wouldn't reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
46. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
47. In the Commissioner's view, a key issue is whether the staff members concerned have a reasonable expectation that their information won't be disclosed to the world at large under FOIA. These expectations can be shaped by factors such as individuals' general expectation of privacy, whether the information relates to employees in their professional role or to them as individuals, and the purpose for which they provided their personal data.

48. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
49. The Commissioner has considered the circumstances of the request and he's satisfied that, despite concerning them in their professional capacity, the data subjects would reasonably expect that their personal data wouldn't be disclosed to the public under FOIA. They haven't consented to disclosure and the Trust has confirmed that it doesn't publish staff rotas for security reasons. In addition, the data subjects may be concerned that disclosing that they were in a certain role on certain days may lead others to consider, wrongly, that they were in some way implicated in the death that had occurred. The Commissioner is therefore satisfied that disclosing the staff rota would cause those staff members harm and distress.
50. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner considers that the general interest in the Trust demonstrating it is transparent has been adequately met through relevant information that's been provided to the complainant. The Commissioner therefore considers that there's no Article 6 basis for processing and so disclosing the information wouldn't be lawful.
51. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he doesn't need to go on to consider separately whether disclosure would be fair or transparent. The Commissioner has therefore decided that the Trust is entitled to withhold the staff rota under section 40(2) of FOIA.

Other matters

52. The Trust has explained how, given the sensitivity of the situation, it has sought to support the complainant outside the FOIA legislation. It has advised the Commissioner that executive staff within the Trust have offered to answer the complainant's questions and to resolve the matter privately. It has also provided the complainant with information outside of FOIA.
53. In addition, the Trust has invited the complainant to meet relevant staff. To date the complainant has refused that invitation, but the Trust has confirmed to the Commissioner that the invitation remains open, and it would welcome the opportunity to talk to the complainant about their concerns at any time.

Right of appeal

54. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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